

**Date:** April 8, 2014

**To:** Thomas J. Bonfield, City Manager  
**Through:** Keith Chadwell, Deputy City Manager  
**From:** Reginald J. Johnson, Director  
Department of Community Development  
**Subject:** Amendment to Existing HOME Investment Partnership Agreement  
Fourth Deed of Trust Loan with Southside Revitalization Phase 1 LP in  
the Amount of \$500,000.00

### **Executive Summary**

On June 18<sup>th</sup> 2012, City Council approved a construction to permanent loan package with Southside Revitalization Phase 1 LP in the amount of \$5,250,000.00 to assist in the financing of 132 rental units on the former Rolling Hills site, now known as The Lofts at Southside. The loan package consisted of two Housing Bond Program Income loans; one in an amount up to \$1,466,261.00 to be repaid from 60% of net cash flow annually at an interest rate of 2% over a 40 year term; the other in an amount of up to \$800,000.00 at 0% interest deferred for 30 years and beginning in the 31<sup>st</sup> year to be repaid from 60% of cash flow over a 45 year term. In addition, a HOME loan up to \$2,033,739.00 at 2% interest to be repaid from 60% of cash flow and a NSP-3 loan in the amount of \$950,000.00 at 2% to be repaid from 60% of cash flow over a 40 year term. Due to additional costs associated with the delays caused by the removal of contaminated soils on the site and unusually wet conditions over the past nine months, the limited partnership is seeking additional financial assistance for the redevelopment effort in an amount of \$500,000.00.

### **Recommendation**

The Department of Community Development recommends that City Council authorize the expenditure of up to \$500,000.00 in HOME funds, and authorize the City Manager to amend the existing construction to permanent fourth deed of trust HOME loan agreement with Southside Revitalization Phase 1 LP in the amount of \$500,000.00 for a total loan amount up to \$2,533,739.00 and to execute such other non-loan related documents as necessary and as required by other lenders and the investor to include but not limited to an intercreditor agreement and a disbursing agreement.

### **Background**

In addition to the financial package approved on June 18<sup>th</sup> 2012, City Council approved a Master Development Agreement (MDA) with McCormack Baron Salazar, Inc. (MBS) which defined the specific rights and responsibilities of the City and MBS for the redevelopment of the former Rolling Hills site located in the Southside community. For the Phase 1 development, the City provided funding in an amount up to \$6,850,000.00 for environmental remediation, the demolition of the existing streets and infrastructure, mass

grading for the entire site and new streets and related public improvements needed to serve Phase 1 (approximately 7 acres upon which the development of 119 multi-family rental units and 13 live work units will occur).

MBS, acting as an agent for the City, as defined in the MDA, entered into a contract with DH Griffin Infrastructure Inc., (DHGI) for site preparation and infrastructure improvements for the approximately 19 acre site which included the removal and disposal of unsuitable soils, asbestos containing materials and other contaminants in an approximate 2 acre area (ravine) on the northeast section of the site. The work in the ravine area would be conducted per a Soil Management Work Plan (SMWP) approved by the North Carolina Department of Environment and Natural Resources (NCDENR) on June 5, 2012. As part of the scope of work, the site preparation contractor was required to clean-up and dispose of subsurface contaminants, primarily asbestos containing materials, along with soil contaminated with lead and polyaromatic hydrocarbons, primarily located in an approximate two acre area of the Phase 1 site. The area was located where half of the building pads (5-10) and both new streets were to be constructed. MBS conducted an extensive environmental Phase 1 and Phase 2 Environmental Site Assessment and geotechnical testing in 2011 and early 2012 and worked closely with NCDENR before environmental remediation began. Extensive boring and test pits indicated that most of the contaminated soil and asbestos contaminated debris was in an approximately two acre buried ravine, which was originally estimated to consist of approximately 30,000 tons of contaminated soil and asbestos contaminated debris at a depth of up to 18 feet below grade. The team of consultants including MBS and the City developed a comprehensive remediation plan which then resulted in the initial Soil Management Work Plan. The work plan required certain handling protocols be followed during excavation, loading and transportation as well as notification to NCDENR should any additional contaminated soil be discovered beyond the original scope.

A Notice to Proceed (NTP) was issued to DHGI on July 16, 2012. The original schedule called for DHGI to complete work and deliver the pads for Buildings 1 and 2 to the housing contractor, Russell-Metcon, by September 29, 2012 and to deliver the pads for Buildings 3-12 and two newly constructed public streets, Chestnut Street and Memphis Street, by December 13, 2012.

As the site work was progressing, MBS was working toward a financial closing and construction start on the Phase 1 construction. MBS closed on September 29, 2012 and since the project had been awarded 2011 tax credits by NCHFA there was a requirement that the 80 tax credit units be placed in service by December 31, 2013. The general contractor was given a limited notice to proceed on Building Pads 1 and 2 and the pond area on October 29, 2012, approximately 30 days later than originally anticipated. Due to the complexity of buildings 1 and 2 and their structural interrelationship with the pond retaining walls, the contract date for substantial completion of these buildings was 400 calendar days from notice to proceed, or December 3, 2013. Work could not begin on the building footers and foundations until the retaining walls were constructed around the pond and along Lakewood and Roxboro Streets. The general contractor had hoped to make up for some of the time lost as a result of this additional environmental work and approval process, but above-average precipitation since construction began, prevented the general contractor's ability to make up for the early delays. These delays and weather events also substantially impeded the general contractor's ability to complete interrelated site work, and retaining walls, as well as the building footers and foundations.

While the general contractor was working on the pond and on foundations primarily for Building 1, the site preparation contractor was continuing its work on excavating and disposing of the contaminated material from the ravine. As work progressed on the remediation, additional areas of potentially contaminated soil on the periphery of the ravine were identified. Per the requirements of the Soil Management Work Plan, work had to be halted while the soil was tested to determine if it was contaminated. This process resulted in the identification of about 11,000 tons of additional contaminated soil outside the area where the primary contaminated soil was located. While extensive borings and test pits were completed as part of earlier environmental sub surface investigations, the new areas of contaminated soil were slightly outside the bounds of the area of contamination identified by the consultants. In addition, an initial requirement of the Soil Management Work Plan was that all soil be classified as asbestos contaminated, which initially required expensive on site handling protocols and out of state disposal at a very high cost per ton. The team and the City worked with NCDENR on alternative approaches over a 5-6 month period with NCDENR finally agreeing that it was acceptable to cap and cover in place all contaminated materials below depths in the ravine where construction activity would not interfere. NCDENR later agreed in March 2013 that approximately 11,000 tons of contaminated soil identified and excavated on the periphery was not asbestos contaminated and could be moved and stored on site. Finally, NCDENR agreed that the otherwise non-asbestos contaminated soil could be reused on site in a deep hole with a witness barrier and a parking lot cap. This was the first time ever that NCDENR had approved this type of approach. Addressing these issues required the preparation and submission of various reports and plans to and review by NCDENR and other state agencies resulting in approval of three amendments to the original Soil Management Work Plan, with the last amendment approved by NCDENR on March 20, 2013.

In late February, as a result of the environmental remediation delays in the ravine area, additional building pads still could not be delivered to the general contractor (other than Building Pads 1 and 2) and along with the unusually wet weather, the general contractor notified MBS that they would be unable to substantially complete the entire project by December 31, 2013. The primary reason for those delays is attributable to the unexpected additional environmental work described above. During March of 2013, an alternate acceleration schedule was discussed to enable delivery of certain buildings which would include the 80 tax credit units in the configuration proposed to and approved by NCHFA. These discussions resulted in a change order to undertake an accelerated schedule to deliver seven of the 12 buildings at a cost of \$296,500.00 to the owner. The costs were associated with the assignment of an additional project manager or site superintendent and acceleration costs for the mechanical, plumbing, electrical and drywall contractors to increase their workforce. In April of 2013, work started to meet this schedule, but excessive rain in April, May, June, and July further delayed site work, particularly the construction of two new public streets and the retaining walls and installation of footers, underground utilities, and foundations on some of the buildings included in the acceleration schedule. On June 30, 2013, the U.S. Small Business Administration issued a declaration of disaster for Durham County due to severe storms and flooding that had occurred.

In August of 2013, the housing contractor informed MBS that it was extremely unlikely that Building 2 (which includes 31 total units) could be completed by year's end and recommended pursuit of another path which would include commencing construction on smaller buildings that could be delivered by year end. MBS gave oral notice to proceed on this new path, which was modified several times throughout the fall of 2013, and approved through several Potential Change Orders (PCO) to pay for additional acceleration costs to try

to deliver 10 of the 12 buildings (which would include the requisite number of low income units) by year end. The PCOs, totaling \$560,063.00 were formally approved through Change Order #8 dated January 20, 2014, although the work was completed in 2013. The costs associated with CO #8 were an additional concrete contractor for buildings 3 and 4 and additional costs for the framing and drywall contractor for building 1.

As it became apparent that the general contractor would not meet the December 31, 2013 placed in service date, MBS along with the City began to research and inquire with NCHFA the possibility of receiving an extension on the tax credits. The return of 2011 tax credits along with a like allocation of 2014 tax credits was approved by NCHFA in December of 2014.

### **Issues/Analysis**

On January 31, 2014 MBS forwarded a letter to the City requesting additional financial assistance for The Lofts at Southside development. The request was based on the project being behind schedule due to the environmental remediation at the site and significant rain events which was beyond the developer's and general contractor's control. The events lead to the building pads not being released to the general contractor by the turnover dates outlined in the contract between MBS and the general contractor. Also MBS stated in the letter that the project not only is behind schedule but the project is over budget by a total of approximately \$3.1 million dollars. Of the \$3.1 million dollars, MBS and or the limited partnership is requesting that the City participate in the costs associated with the acceleration of the work and with the approval of the tax credit exchange. The request, in the amount of \$1,166,458.00 is outlined below:

<u>Costs</u>	<u>Tasks</u>
\$ 296,500.00	Change Order #2 for acceleration related costs (actual cost)
\$ 560,063.00	Change Order #8 for acceleration related costs (actual cost)
\$ 75,000.00	Approximate additional Construction Administration Costs of Design and Engineering Consultants due to extended contract time (6 months)
\$100,166.00	Additional fee to NCHFA for the exchange of 2011 tax credits for 2014 tax credits (actual cost)
\$ 14,834.00	Legal fees associated with the tax credit exchange (actual cost)
\$ 44,000.00	Additional Insurance Costs due to extended contract time (6 ½ months) (actual cost)
\$ 4,500.00	Additional Lender Monthly Inspection Fees (6 months) (actual cost)
\$71,395.00	Cost of sidewalks and street trees that was shifted from the Site Prep and Public Improvements

The MDA defines the specific rights and responsibilities of the City and MBS for the redevelopment of the former Rolling Hills site. Within the MDA, there is language that states the City shall deliver the Development Site for an Approved Phase to the Developer (or an appropriate Owner Partnership) in Clean and Rough-Graded condition within the timeframes anticipated by the Master Schedule or any Phase-specific schedule established by the parties. The schedule defined September 29, 2012 as the phase 1 turnover date. Pads for building 1 and 2 along with the pond were turned over on October 29, 2012 and with a 400 day construction schedule should have been complete by the December 31, 2013 placed in service date. The remaining building pads were also scheduled for turnover that would have allowed sufficient time for completion by the December 31, 2013 placed in service date. Environmental delays and an unusually wet fall and spring created site

conditions that prevented the turnover of the building pads in a timely manner. In discussion with City representatives and MBS, all have agreed that the relationship is a partnership and it shows a commitment from both parties to the Southside redevelopment effort by the City and MBS agreeing to participate in the cost overruns as a result of the delays, largely due to the environmental conditions on the site. With the approval of the \$500,000.00 loan amendment, MBS and or the limited partnership will finance the additional costs of the \$1,166,458.00 acceleration related costs, along with approximately \$2.0 million of other costs overruns. The City has also informed the limited partnership and MBS that there will be no additional funding available for the Phase 1 development effort.

### **Alternatives**

The City Council could elect to not approve the additional financing with the Southside Revitalization Phase 1 LP or recommend a different amount of financial assistance. Without approval, the limited partnership will need to seek additional resources which could add additional delays to the project which has a placed in service date of December 31, 2014. Nonetheless, the City and MBs remain fully committed to completing the Phase 1 effort by year end.

### **Financial Impact**

The financial impact associated with the HOME Investment Partnership Loan Agreement Amendment with the Southside Revitalization Phase 1 LP will be a loan amount increase of \$500,000.00 in HOME funds. Availability of the funding is subject to City Council approval of a substantial amendment to the FY 13-14 Annual Action Plan deleting \$432,085.00 in HOME funds for the second phase of rental development by MBS, reducing the HOME funding for Southside homeownership loans by \$67,915.00 and adding \$500,000.00 in HOME funding for MBS Phase 1 rental development. The funds are available in the following account 1250DO14-76400-DHM14. The terms of the loan will remain as outlined in the original loan agreement.

### **SDBE Summary**

The SDBE Summary section is not applicable for this loan amendment as goals have already been established for the project which is currently at 37.5% minority and 8.5% women. The established goals were 20% minority participation and 10% women.